STATE OF MICHIGAN

COURT OF APPEALS

PAUL F. NOWITZKE,

Plaintiff-Appellant,

v

JOHNSTON ACQUISITION CORPORATION, d/b/a EAGLE TRAILERS and ROBERT R. JOHNSTON,

Defendants-Appellees.

UNPUBLISHED
March 4, 2003

No. 238481
Wayne Circuit Court
LC No. 00-027187-CL

Before: Kelly, P.J. and White and Hoekstra, JJ.

PER CURIAM.

In this claim under the Michigan Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant Robert R. Johnston is the founder of defendant Johnston Acquisition Corporation, and plaintiff's former supervisor. Prior to his discharge, plaintiff had a twelve-year employment history with the company. At the time of his dismissal, he was employed in a management position as a "Just In Time coordinator," a position apparently designed to improve production efficiency. Plaintiff previously worked for the company as a painter, midnight-shift supervisor and trainer.

Plaintiff has a history of heart problems, having suffered a heart attack in June 1990. At that time, he had angioplasty performed and did not work for approximately six weeks before returning to his then duties as shift supervisor. He returned to work without restrictions and could not recall whether anyone regarded him as "handicapped" or "disabled" upon his return. In October 1997, plaintiff suffered another heart attack while on the way to work. He received a second angioplasty and had steel stents placed into his coronary arteries. He was hospitalized for four or five days, but returned to work without restrictions in late November 1997. Plaintiff did not ask for accommodations and was able to resume his normal work duties. Again, he could not recall that others treated him as disabled upon his return.

In his deposition, Johnston admitted that he was aware of plaintiff's heart attacks in 1990 and 1997. He was also aware that plaintiff had stents placed in his arteries. Johnston knew that

plaintiff returned to work without restrictions in late November 1997, after his second heart attack.

On December 9, 1997, citing a weak economy, Johnston laid off two management employees, plaintiff and another person. Plaintiff maintained that Johnston told him that the termination was temporary; however, he subsequently learned that it was not. Johnston admitted that the other management employee whose employment was terminated had also previously been hospitalized and was receiving ongoing treatment for a medical condition at the time of his layoff. After plaintiff's layoff, a number of management changes occurred. At one point, the midnight-shift supervisor position became available but Johnston would not return plaintiff to that position, despite the fact that he had previously held it for six years. The company offered plaintiff contract work making deliveries. In addition, two weeks after plaintiff's discharge, Johnston circulated a memorandum stating his concerns about employee health situations and insurance costs.

Plaintiff filed suit claiming a violation of the PWDCRA. Plaintiff maintained that Johnston discharged him from his position because he was perceived as "disabled" due to his heart condition. Specifically, he maintains that, shortly after he suffered a second heart attack, he was discharged because his employer thought that retaining him would increase its costs of providing group medical insurance. Defendants moved for summary disposition contending that plaintiff failed to state a prima facie case and that plaintiff's claim was preempted by the Employee Retirement Income Security Act (ERISA) anti-discrimination provision. See 29 USC § 1144. The trial court granted the motion, finding that plaintiff had failed to satisfy the three-part test for perceived disability found in *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999). The court declined to review defendants' ERISA preemption claim. Plaintiff appeals the trial court's finding that he failed to demonstrate a "disability" as defined under PWDCRA.

Although plaintiff has presented evidence casting doubt on defendants' stated motives for terminating his employment, we conclude that plaintiff has failed to establish a prima facie case of disability discrimination pursuant to MCL 37.1103(d)(*iii*) and thus find that summary disposition was properly granted to defendants.[1]

Under the PWDCRA, an employer shall not:

> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position. [MCL 37.1202(1)(b).]

Absent direct evidence of discriminatory animus, to establish a prima facie case of discrimination prohibited under the act, a plaintiff must demonstrate: (1) that he is disabled as defined by the act, (2) that the disability is not related to his ability to perform the duties of a particular job, and (3) that he was discriminated against in one of the ways described in the

[1] Because plaintiff did not argue at trial that he fell within the definition of disability set forth in MCL 37.1103(d)(*ii*), we do not review plaintiff's possible claim under this subsection.

statute. *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998); *Chiles, supra* at 473. To establish a prima facie case, the plaintiff must produce enough evidence to create a rebuttable presumption of discrimination. *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118, (1998). The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the action taken. *Id*. Once the defendant has met this burden, the plaintiff must prove that the articulated reason was a mere pretext by a preponderance of the evidence. *Id.*

Plaintiff did not present direct evidence of discriminatory animus by defendant.[2] Therefore, under the above analysis, plaintiff was first required to show he was disabled as defined under the act. Pursuant to MCL 37.1103:

> (d) Except as provided under subdivision (f), "disability" means 1 or more of the following:
>
> (*i*) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> (A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
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> * * *
>
> (*ii*) A history of a determinable physical or mental characteristic described in subparagraph (*i*).
>
> (*iii*) Being regarded as having a determinable physical or mental characteristic described in subparagraph (*i*).

Plaintiff contends that, because Johnston regarded plaintiff as having a disability, his heart condition qualified under the act. In support of his claim, he argues that his heart condition qualified as a disability under the statute because he was perceived by defendants as having a determinable physical characteristic that impaired his ability to work.

In *Michalski v Bar-Levav*, 463 Mich 723, 732; 625 NW2d 754 (2001), the Court presented the following discussion of a claim under MCL 37.1103(d)(*iii*):

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[2] Plaintiff maintains that the statement by Johnston that plaintiff "could not handle" the midnight-shift position and the letter discussing insurance claims were, in fact, direct evidence of discrimination. However, this evidence, if believed, would properly cause an *inference* of discriminatory animus, rather than require a *conclusion* that such existed. See *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). Thus the court correctly analyzed the claim as a prima facie case of indirect discrimination.

> [T]he plain statutory language does require that the plaintiff prove the following elements: (1) the plaintiff was regarded as having a determinable physical or mental characteristic; (2) the perceived characteristic was regarded as substantially limiting one or more of the plaintiff's major life activities; and (3) the perceived characteristic was regarded as being unrelated either to the plaintiff's ability to perform the duties of a particular job or position or to the plaintiff's qualifications for employment or promotion.

Thus, to determine whether plaintiff can meet the first two elements of this test requires an analysis similar to that generally used to determine whether a disability exists within the meaning of the PWDCRA, adopted by this Court from the three-part federal test used under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*:

> First, we consider whether respondent's [complaint] was a physical impairment. Second, we identify the life activity upon which respondent relies ... and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity. [*Chiles, supra* at 474, quoting *Bragdon v Abbott*, 524 US 624, 631; 118 S Ct 2196; 141 L Ed 2d 540 (1998).]

Defendants do not dispute that plaintiff's heart condition was a physical impairment, although they maintain that it was, at most, a temporary one—an assertion that somewhat fails to differentiate between the actual condition or characteristic and what is essentially an unfortunate result of having heart disease. In addition, "work" is a major life activity. *Lown v JJ Eaton Place*, 235 Mich App 721, 735-736; 598 NW2d 633 (1999). Thus, plaintiff has met the first two elements of the test.

However, plaintiff is unable to meet the third element of the test. "An impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment elsewhere, does not substantially limit the major life activity of working." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 218; 559 NW2d 61 (1996); see also *Lown, supra* at 735-736 (plaintiff required to demonstrate that she was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities"). Here, plaintiff testified that he returned to work with no restrictions and that he was able to perform every aspect of his job upon his return. Although plaintiff was unable to work during the period prior to his return to full employment, this is not sufficient to meet the requirement of a "substantial limit" on work activities.

Moreover, the fact that Johnston may have regarded plaintiff as a risk for future health problems is insufficient to show that plaintiff was perceived as having a disability as defined under MCL 37.1103(d)(*i*). The test set forth in *Michalski* does not require plaintiff to demonstrate actual symptoms in order to recover. *Michalski, supra* at 723 n 11. However, the *Michalski* Court held that an employer's fear that a medical condition may affect the employee's ability to work in the future is not enough to establish grounds for recovery under MCL 37.1103(d)(*iii*). *Id*. at 733-734. Here, although plaintiff presented facts to indicate that Johnston may have discharged him because he was afraid that plaintiff's medical condition might cause

him to incur higher insurance costs in the future, plaintiff did not present evidence to show that Johnston thought plaintiff's condition was limiting his present work ability.

Therefore, plaintiff has failed to show that his heart condition, with no evidence of any residual physical impairment affecting his ability to perform his duties, constitutes a disability under the act. *Michalski, supra* at 733-734; *Chiles, supra* at 480-481; see also *Lown, supra* at 733-734. Thus, the trial court correctly granted summary disposition in favor of defendants.[3]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra

[3] As the majority in *Michalski* aptly noted, it certainly "seems incongruous that the [act] does not provide protection against discrimination on the basis of a possibility that one might become handicapped in the future… ." *Michalski, supra* at 733 n 14. This would seem especially true given the prohibition against the use of genetic information or family history to discriminate against an individual pursuant to MCL 37.1202, which may involve no evidence of an existing medical condition at all. However, under the circumstances, we affirm the trial court's decision.